Employment Standards TRIBUNAL

An appeal

- by -

Glenn Shigematsu
("Shigematsu")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2002/410

DATE OF HEARING: October 31, 2002

DATE OF DECISION: December 10, 2002

DECISION

APPEARANCES:

Glenn Shigematsu	On his own behalf
Marc White & Michael Carroll	On behalf of PMRF

OVERVIEW

Glenn Shigematsu has appealed, pursuant to section 112 of the *Employment Standards Act* ("the *Act*"), a Determination issued by a delegate of the Director of Employment Standards (the "Director") on July 8, 2002. The Determination is Mr. Shigematsu (the "Appellant") is not entitled to compensation for length of service, nor is he entitled to a retroactive wage increase.

Underlying the decision that Mr. Shigematsu is not entitled to length of service compensation is a decision that he was terminated for just cause by Physical Medicine Research Foundation ("PMRF"), his former employer. According to the delegate, Shigematsu's termination is justified by his behaviour on the 26th of February, 2001 and the employer's need to provide a safe workplace free from racial harassment. The delegate found, moreover, that Shigematsu had been previously told that he faced termination if there were further angry outbursts by him.

Only the decision reached in respect to just cause is appealed. The employee admits to losing his temper on more than one occasion but he claims that he was provoked. He claims that statements made on the 26th of February, 2001 should not be considered to be a form of racial slur and that he apologised in any event. He notes that he assaulted no one. He goes on to ask that severance pay be awarded on the basis that it is a condition of the employment.

I have decided that there are not facts to support a conclusion that the employer had just cause. There is not evidence to show that the employee was told that his job was in jeopardy because of his angry outbursts. There is no excusing what was said on the 26th but the employee's misconduct is not incompatible, nor inconsistent, with continuing the employment relationship.

An oral hearing was held in this case.

ISSUES

The issue is whether the employer did or did not have just cause to terminate Glenn Shigematsu.

Should it be decided that the employer did not have just cause, there is then a need to address the matter of remedy. The employee is seeking more than length of service compensation. He is seeking enforcement of the severance pay conditions of his employment, which is to say, one month for each year of service.

What I must ultimately decide is whether it is or is not shown that the Determination ought to be varied or cancelled, or a matter or matters referred back to the Director, for reason of an error or errors in fact or law.

FACTS

The Physical Medicine Research Foundation is a charity. Glenn Shigematsu worked as an accountant for PMRF from March 3, 1988 to March 2, 2001.

The first years of the employment were uneventful but on the 4th of April, 1997, Marc White, the Executive Director of PMRF, sent Shigematsu a memo in which it is said that "your behaviour in the office has improved greatly" but "this old pattern occasionally pops up". White, in the memo, goes on to tell the employee that he should not raise his voice in the office and that he should not argue with White but be more cooperative.

> "It is not appropriate for you to argue with me. If you are unclear about what I am asking in the future I will be happy to sit down with you to explain what I am wanting. It is disruptive to the office to have our voices raised. This is an old pattern and it must no longer happen. I am expecting greater cooperation in assisting me with what I am asking rather than arguing with me about why you think it can't be done. We need to work together so that I get what I need."

In addition to the above, Shigematsu was advised that he should not, under any circumstances, discuss overall budget concerns with any staff and that he was expected to convey confidence and an overall positive attitude. That is the extent of that particular warning.

According to the delegate, there was an improvement in Shigematsu's behaviour for a period of months but his temper still flared on occasion. That may be but I find that it is not until May 16, 1998 that Shigematsu is again served with a written warning about his behaviour.

White, by memo dated May 16, 1998, gave Shigematsu plain clear warning that his job was in jeopardy unless he stopped hinting or telling employees that the employer might not have sufficient funds to meet its payroll. This particular conduct was clearly and obviously of great concern to the employer but it had other, less serious concerns and the employer made note of that in the memo. Shigematsu was told that he must improve in four other respects, namely, assist staff with their accounting needs "in a polite and cooperative way", refrain "from making personal judgements about whether they need the information related to their area of responsibility", help identify weaknesses in (the charity's) accounting and control systems, and stop raising his voice in the office. He was not told that he faced termination if there was a failure to improve in any of these latter respects.

The employer claims that Shigematsu was warned about improper use of the charity's internet connection in a memo dated March 12, 2000. The employee tells me that he did not receive the memo, that he does remember being questioned by White about use of the internet but White appeared satisfied with his answer and that was the end of the matter. I find that it is irrelevant whether the employee was or was not served with this memo as the memo makes no mention of angry outbursts or racial comments. In my view, all that is important about the memo is the fact that it contains a warning that a failure to comply with the employer's internet policy "may result in disciplinary action including loss of employment".

I find that Shigematsu lost his temper and shouted at Ana Marie Butcher, PMRF's Office Manager, on more than one occasion in the year 2000. The delegate has decided that there was an angry outburst on July 6, 2000. According to the delegate, Shigematsu in that instance blamed Butcher for a decline in membership. Shigematsu, on appeal, claims that he did not accuse Butcher of responsibility for a decline in membership but he does not deny that he lost his temper on the 6th of July, indeed, he admits to shouting at Butcher on two separate occasions (letter to White dated March 18, 2002). He admits that he yelled at Butcher because she left an office door unlocked and also switched lights off, leaving the office unlit. He also admits that he lost his temper a second time when Butcher continued to give him bills to pay even though she was told to stop doing that because there was no money to pay the bills.

On one of these occasions, it appears that Shigematsu's temper really got the better of him. He cut his lip on his dentures in yelling at Butcher.

As a result to these outbursts, Butcher and Shigematsu were offered a chance to attend anger management counselling at the employer's expense. Shigematsu did not take the employer up on its offer.

The delegate has decided that Shigematsu was at this point told that if he ever again lost his temper that he would be terminated. As matters are presented to me, I find that there is in fact not evidence to show that Shigematsu was told that he faced termination unless he learned to control his temper. As matters are presented to me, there is no witness, nor is there a written warning, to confirm it. Indeed, I am not shown that there were any written warnings about being angry or raising one's voice after the May 16, 1998 warning.

The culminating incident occurred on Monday, February 26, 2001.

PMRF was vacating some of its office space. Butcher was responsible for the move and on Thursday, the 22nd, she began to pack things up. She put a few boxes near Shigematsu's desk. The next day she moved some furniture to a point near Shigematsu's desk and she piled boxes on the furniture. Shigematsu was annoyed by that. He described the stack of furniture and boxes as dangerous, noting that there could be an earthquake. (Both Shigematsu and Butcher told the delegate that there was an earthquake a day or two before the culminating incident.) Shigematsu suggested that Butcher move stuff into White's office. She did not take his advice.

At some point in the weekend, Shigematsu went to work and moved furniture and/or boxes away from his desk and into another room. On reporting for work on Monday, however, he found that Butcher had moved everything back to where it had been on Friday. Shigematsu got red-in-the-face angry and he proceeded to get into a shouting match with Butcher. The argument got quite heated. Shigematsu admits to uttering the words "dumb Filipino" or a "stupid Filipino". According to Butcher, his exact words were "fucking stupid dumb Filipinos" (memo written by Butcher at 10:52 a.m. on February 26, 2001). I am inclined to believe Butcher. It is in harmony with what a witness has had to say to the delegate.

The witness told the delegate that the altercation on the 26th was such that he was concerned for Butcher's safety. I find that that was because of all the shouting: It is not because Shigematsu said anything threatening. Shigematsu did not strike Butcher and he did not threaten her in any way.

Butcher did tell the witness and another person (Ana) that they should call 911 if there was a physical fight. But her memo, written at 10:52 a.m. on the 26th, does not make mention of a concrete threat to safety. It the racial slur that is of primary concern to Butcher in her memo. [While it may not be clear to

the employee, it is clear and obvious to me that even "dumb Filipino" or "stupid Filipino" is racist comment in that the words display an antagonism towards an individual which is not for reason of the person as an individual but her race, ancestry and/or place of origin.] Beyond that, Butcher states that she is upset at having to endure yet another angry outburst by Shigematsu.

Later on February 26, 2001, Shigematsu apologised to Butcher for what he said was a slip of the tongue. Butcher said that she could not overlook his racist comment, that she was fed up with his angry looks, his insults and his angry outbursts and that she was going to take matters up with White, away in Sweden at the time.

White returned to his office and, on hearing what had happened, he decided that he would terminate Shigematsu for "inappropriate office behaviour" (letter of termination dated March 2, 2001). In explaining matters to me, White tells me that it was his belief that he had no choice but to do so or Butcher would quit.

Shigematsu wrote White on March 6, 2001. PMRF was at that point suggesting that he obtain anger counselling and Shigematsu tries to defend himself in his letter. He argues that it was his safety that was at stake but states "Anger management – Only yelled at her to stop – She's still alive, isn't she." The employer sees something chilling in that. I do not. My reading of those words is that they are not confirmation of a threat to safety. I am satisfied that Shigematsu is merely trying to say, in his own ham-fisted way, that all he did was yell at Butcher, he did not hurt her.

The employee admits to throwing a binder at some point. I consider this to be a further example of the employee's tendency to lose his temper. It was not directed at anyone and no one was hit by the binder.

ANALYSIS

Under Section 63 of the *Act*, employers are liable to pay employees compensation for length of service where their employment lasts for more than 3 consecutive months. That liability can be discharged, however.

> **63** (3) The liability is deemed to be discharged if the employee
> (a) is given written notice of termination as follows:
> (i) one week's notice after 3 consecutive months of employment;
> (ii) 2 weeks' notice after 12 consecutive months of employment;
> (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
> (b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
> (c) terminates the employment, retires from employment, or is dismissed for **just cause**.
>
> (my emphasis)

The Tribunal has said that it will be guided by the following principles in cases where it is argued that termination is for cause (*Kenneth Kruger*, BCEST No. 003/97.

> "1. The burden of proving the conduct of the employee justifies dismissal is on the employer;

> 2. Most employment offences are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:
>
> > 1. A reasonable standard of performance was established and communicated to the employee;
> >
> > 2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
> >
> > 3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
> >
> > 4. The employee continued to be unwilling to meet the standard.
>
> 3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.
>
> 4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal."

The delegate has in this case decided that the employer had just cause. If so, it could only be for reason of gross misconduct. I have not been shown that Shigematsu was terminated after being notified, adequately, that he stood to lose his job if there were further angry outbursts, he raised his voice in the office, swore at an employee, or made further racist comments. The employee was given written warning that he stood to lose his job if he ever again told an employee or hinted that the employer might not be able to meet payroll but his termination is not for that reason. It appears that the employer at least contemplated giving the employee written warning that he might lose his employment for improper use of the employer's internet connection but, again, it is not for that reason that he was terminated. He was terminated for reason of his angry outbursts, that on February 26, 2001 in particular, and his racial slur. What I must decide is whether that is misconduct which justifies immediate dismissal.

Wilful disobedience, neglect or carelessness causing serious damage, and serious acts of misconduct may justify dismissal without notice. The basic question that must be asked is whether the misconduct is incompatible or inconsistent with the continuing of the employment relationship. The Supreme Court of Canada has said that the matter of whether an employer does or does not have just cause, even in cases where dishonesty is shown, is a question that requires assessment of the context of the misconduct (*McKinley v. BC Tel*, [2001] S.C.J. No. 40, at paragraph 48).

H. A. Levitt in *The Law of Dismissal in Canada* (2nd ed. 1992), page 124, has had this to say about the need to consider the circumstances of the misconduct,

> "What constitutes just cause in a specific situation is particularly difficult to enumerate because it depends not only on the category and possible consequences of the misconduct, but also on both the nature of the employment and the status of the employee ... .
>
> The existence of misconduct sufficient to justify cause cannot be looked at in isolation. Whether misconduct constitutes just cause has to be analyzed in the circumstances of each case. Misconduct must be more serious in order to justify the termination of a more senior, longer-service employee who has made contributions to the company."

The delegate has in this case decided that the employer had just cause because employers need to provide a safe workplace free from racial harassment. The Tribunal has said that a criminal act of assault on a co-worker can justify termination (*Broadcam Holdings Ltd*., BCEST No:. D241/98) and that threatening a co-worker with a crowbar may justify summary dismissal (*Sears Canada Inc*., BCEST No. D210/02). But in this case no one was assaulted and no one was threatened. There is in fact no evidence to show that the employee put anyone's safety at risk.

It does appear that the intensity of conflict between Shigematsu and Butcher was escalating but I am not satisfied that Shigematsu's outburst on the 26th, the racial slur included, was incompatible or inconsistent with continuing the employment. Shigematsu had worked for the employer for almost 13 years. He had no history of racial harassment. He tended to lose his temper but, unlike his telling employees or hinting that they might not get paid, the employee was never served with written warning that might lose his employment if there were further angry outbursts. Although it is not justification for his outburst and what was said, it is to an extent understandable that the employee was angry. In his view, the pile of furniture and boxes that was near his desk was dangerous and he had gone to the trouble of moving things into another room on the weekend. In this context, I find that his misconduct does not justify his termination. The appropriate response would have been to serve Shigematsu with plain, clear warning that he faced being terminated if there was further racial harassment or any more angry outbursts.

Remedy

Shigematsu is seeking severance pay as that is a condition of his employment. He was advised by the delegate that she could award length of service compensation but not the severance pay that he was seeking. That is my understanding of what a delegate of the Director may award under the *Act*.

As Shigematsu was employed by PMRF for more than 8 years, he is entitled to 8 weeks' length of service compensation. The parties agree that 8 weeks' pay is $4,800.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated July 8, 2002 be varied. Physical Medicine Research Foundation ("PMRF") is ordered to pay Glenn Shigematsu $4,800 plus 8 percent vacation pay (another $384) and all interest which is owed pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal